Supreme Court, U.S.
FILED

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No. ——

In The

Supreme Court of the United States

October Term, 1997

LEROY HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can a person be held criminally liable under the federal mail fraud statute, consistent with the Due Process Clause and the "fair warning" doctrine, where the actions that constituted the alleged scheme or artifice to defraud were not and could not have been reasonably calculated to deceive the purported victim?

2. Can a buyer of real property be held criminally liable under the federal mail fraud statute, consistent with the Due Process Clause and the "fair warning" doctrine, where the actions that constituted the alleged scheme or artifice to defraud involved the making and soliciting of offers for the property, and where: (a) the buyer's offer price was based on public-record information about similar property sales; (b) the seller knew that the offer price was based on that public-record information; (c) other information about the value of the property was known to the seller and available from public records; (d) the buyer believed that the seller was advertising the property for sale on the open market; and (e) the seller was under no obligation to accept the buyer's offer?

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OPINIONS BELOW

The judgment of the Court of Appeals for the Eleventh Circuit is reported at *United States v. Hill*, 116 F.3d 1493 (11th Cir. 1997). The opinion of the Court of Appeals, reproduced in the Appendix ("*App.*") at *App.* 3-6, is unpublished. The opinion of the United States District Court for the Southern District of Alabama denying Hill's post-trial motions, reproduced at *App.* 7-19, is also unpublished.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on June 4, 1997, *App.* 1-2, and denied Petitioner's Suggestion of Rehearing En Banc, or, in the Alternative, Petition for Rehearing, on August 8, 1997. *App.* 34-35. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, section 1341, provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article,

> or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, cl. 4.

STATEMENT OF THE CASE

Petitioner Leroy Hill ("Hill") appeals from his conviction on three counts of mail fraud, in violation of 18 U.S.C. § 1341. As stated in the Indictment, the Alabama Department of Mental Health and Mental Retardation (the "Department" or "ADMHMR") sold Hill 80 acres of

real estate for $48,400 in August 1993, even though a sister state agency that managed the property had once determined that timber on the property was worth $183,000. *App.* 36. In other words, Hill was indicted for fraud because he paid less than the real estate turned out to be worth.

This Petition asks the Court to review Hill's convictions for engaging in a "scheme or artifice to defraud" that consisted of nothing more than making and soliciting offers for real estate where: (a) Hill's offer price was based on public-record information about similar property sales; (b) the seller knew that Hill's offer price was based on public-record information; (c) other information about the value of the property was known to the seller and available from public records; (d) Hill believed that the seller was advertising the property on the open market; and (e) the seller had no obligation to accept Hill's offer for the property. The Writ should be granted to enable the Court to decide whether a person can be criminally liable for fraud, consistent with the Due Process Clause, where his actions were not and could not have been reasonably calculated to deceive the purported victim.

A. Background

Although Hill purchased the property in August 1993, this case did not arise until unrelated political events began to unfold 18 months later. In February 1995, a front-page story in the *Mobile Register* read as follows:

> Former [Alabama] Gov. Jim Folsom's administration sold state land for $605 an acre to prominent Mobile businessman Leroy Hill, even though the land contained full-grown timber valued at nearly quadruple the sale price.

The story also noted that then Alabama Attorney General Jeff Sessions, who was campaigning for the United States Senate, "is investigating the sale as part of his wide-ranging probe of Folsom." Seven months later, Hill (alone) was charged in connection with the sale.

B. Course of Proceedings

The Indictment was returned under seal by a grand jury in the Southern District of Alabama on September 21, 1995, and disclosed at a joint press conference between the Alabama Attorney General and the United States Attorney for the Southern District of Alabama on November 3, 1995. *App.* 36-41.[1] The Indictment alleged that Hill:

> devised a plan to purchase real property, including its timber and mineral rights, from the State of Alabama for a price at less than one-third of its actual value by making it appear to certain state officials that the land was only worth the price he eventually paid for it.

App. 37. It further alleged that the mail was used on four occasions in connection with this plan to misrepresent the value of the seller's own real estate to the seller itself: a letter dated July 16, 1993, from Bud Jones, a Mobile,

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[1] The indictment was sealed while Attorney General Sessions attempted to negotiate a plea agreement with Hill. Those negotiations failed, and the state did not charge Hill.

Alabama, realtor to the seller (Count 1); and letters from Hill and two employees of Hill's business dated July 27, 29 and 30, 1993, containing offers to purchase the land, made in response to an expected advertisement (Counts 2-4).

The case was tried before the Honorable Charles R. Butler and a jury, beginning on February 12, 1996. Federal jurisdiction was premised on 18 U.S.C. § 3231. The jury returned a verdict on February 16, 1996, acquitting Hill on Count 1 relating to the Bud Jones letter, but finding Hill guilty on Counts 2-4 relating to the bid letters. Hill's post-trial motions were denied (*App.* 7-19), and he was sentenced to 15 months imprisonment, two years of supervised release, a $20,000 fine, and restitution of $111,171.25 (*App.* 20-32).

Hill appealed to the Eleventh Circuit, arguing, *inter alia*, that its decision in *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), required a reversal of the convictions. In *Brown*, the court reversed mail fraud convictions of former officers of General Development Corporation ("GDC") who had been charged with authorizing misrepresentations about the value of GDC houses, including misrepresentations about their investment potential, resale markets and rental income, holding as follows:

> reasonable jurors could not find that a person of ordinary prudence, about to enter into an agreement to purchase a GDC home in Florida, would rely on . . . the seller's own affirmative representations about the value or rental income of the GDC homes. Therefore, a "scheme to defraud" within the meaning of the federal criminal statutes has been not [sic] proved.

Id. at 1559. The court in *Brown* also identified two principles applicable to any review of a mail fraud conviction, and two additional elements that must be satisfied where the alleged scheme involves real estate values. Specifically, the court held that in any mail fraud case, the government must prove that "a reasonable person would have acted on the representations" at the heart of the alleged scheme, and that the defendant intended to create a scheme " 'reasonably calculated to deceive persons of ordinary prudence and comprehension.' " *Id.* at 1557 (*quoting Pelletier v. Zweifel*, 921 F.2d 1465, 1498-99 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991)). Where the alleged scheme involves real estate values, the court held that a crime is not proved where "a reasonable juror would have to conclude that the representation is about something which the customer should, and could, easily confirm . . . from readily available external sources." *Id.* at 1559. Finally, where information about the real estate market is readily available, "only very rarely (if ever) could a reasonable jury find that a defendant effectively prevented the discovery of market prices." *Id.* at 1560.

In this case, however, the court of appeals simply ignored these standards, issuing a brief, *per curiam* opinion, without the benefit of oral argument, that purported to distinguish *Brown* as follows:

> Hill argues that he is entitled to a new trial in light of *United States v. Brown*. . . . *Brown*, however, is distinguishable from the present case. Here the fraudulent scheme perpetrated by Hill went far beyond mere misrepresentations about the market value of the 80 acres of state land. Indeed, the evidence demonstrated that as part of his scheme, Hill caused rigged bids to be

> prepared and submitted to ADMHMR. Accordingly, we affirm Hill's mail fraud convictions.

App. 4-5.[2] By affirming Hill's conviction based on the meaningless description of "rigged bids," without regard to the obvious fact that Hill could not have possibly "rigged" or otherwise controlled bids for real estate that he believed would be advertised on the open market, the court of appeals effectively held that **any** mail fraud conviction can be affirmed without regard to whether the defendant's conduct was or could have been reasonably intended to deceive anyone, whether the purported victim reasonably relied on any representations made by the defendant, whether the same information was available to both parties at the time they agreed to enter into a real estate transaction, or whether the defendant could have prevented the other party to the transaction from discovering market information about his own property. Moreover, the lower court's cursory affirmance of Hill's convictions expanded the scope of the mail fraud statute beyond any previously-recognized limits, and violated Hill's constitutional right to a fair warning that his conduct could subject him to criminal liability.

C. Statement of Pertinent Facts

In or about July 1993, Hill learned that ADMHMR would make available for sale an 80-acre parcel of real estate adjacent to Hill's Jackson Creek Ranch, a 3,500-acre cattle ranch that Hill had assembled over 30 years

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[2] In fact, Hill did not ask for a new trial, but asked for a reversal of his convictions based on *Brown*.

through 37 acquisitions. Hill had wanted to purchase the 80-acre parcel for several years, and asked Richard Hanan, Commissioner of the Department, how to go about purchasing the land.

The evidence at trial showed that Hanan did not set a price for the real estate, or review the Department's files about the property, or hire an appraiser to value the property. Instead, Hanan asked Hill – the prospective purchaser of the property – to provide him with the name of a real estate company in Mobile, and then told Hill that the Department would advertise the property for sale and want at least three bids in response. Hill provided Hanan with the name of Bud Jones as a local realtor, and three bids in response to the expected advertisement. Hanan accepted Hill's bid price, without ever advertising the property for sale. Eighteen months later, Hill was indicted for fraud.

1. The Bud Jones Letter.

The first count of the Indictment against Hill was based on the letter Bud Jones sent to the Department. Hill was acquitted on that count because the evidence showed that he could not have reasonably intended to deceive the Department about the value of the property. The government's chief investigator in the case, Ed McFadden, testified about the circumstances in which Hill provided Jones' name to Hanan:

> Hannon [sic] told [Hill] that he had called at a good time because the Department had recently decided that they had several pieces of land that they had no use for. He then asked Hannon [sic]

> how he could go about purchasing the land. Hannon [sic] told him it was not quite that simple, that it was a little more complicated than that because he was doing business with the State of Alabama. Hannon [sic] told him first of all we will need to know what other properties in the area are selling for and asked him if he knew a professional real estate company.

Hill told Hanan that he knew Roberts Brothers, which "was a reputable company that he had done business with several times," and that he could specifically recommend Bud Jones.

Jones testified that Hill told him he gave Jones' name to Hanan, but did not tell him what information Hanan would want. Jones further testified that he received a call from George Carleton, who worked for Hanan at the Department, asking for information about prior sale prices of comparable properties in the area. By letter dated July 16, 1996, Jones responded as follows:

> Dear Mr. Carleton:
>
> Per your request, please find enclosed the tax map with the land in question highlighted in yellow. This land is overflow land (swamp) as it is depicted on the enclosed deed. **There has been other land of this type sold in this general area ranging from $378-600 per acre.** I am enclosing a map with three other properties highlighted in blue. It shows number of acres and sales prices.

> If I can be of further assistance, please give me a call.
>
> S/ Bud Jones

The information contained in the Bud Jones letter was accurate, obtained from public records, and available to the Department or any other person interested in purchasing the property. At Hill's subsequent request, Jones sent a copy of his letter to Hill.

2. The Offers for the Property

The evidence at trial also showed that Hanan told Hill he would advertise the property for sale, and would want to receive at least three offers in response to the advertisement. Dan Buckley, an employee of Hill's business, testified that when Hill told him the property was available, Buckley "joked" that he might bid on it. Hill responded that "anyone could bid because as he understood it was going to be advertised in the paper." In light of that understanding, Hill, Buckley and another employee of Hill's business all submitted offers, ensuring that three bids were received in case no one else responded to the advertisement. Moreover, in anticipation of the open-market bid process, Hill's offer of $605 per acre was higher than the prior sale prices described in the Bud Jones letter. **This offer could not have been intended to misrepresent the value of the property, nor could it have reasonably been expected to do so, because Hill anticipated an open-market bid process in which any interested bidder could participate and offer to buy the property.**

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Petition raises an important question about the limits of the widely-used, but rarely-defined, phrase "scheme or artifice to defraud." Although the phrase has been part of the mail fraud statute (and its predecessor) since 1909, this Court has never defined it, and has not addressed the statute at all in the decade since its decision in *McNally v. United States*, 483 U.S. 350 (1987), when Justice Stevens observed that the Court had given "no guidance" to lower courts about how to define the prohibitions of the mail fraud statute. *Id.* at 376 (Stevens, J., dissenting). In this case, the Court is presented with the opportunity to decide whether a person can be held criminally liable for fraud, consistent with the Due Process Clause and the "fair warning" doctrine, where his actions were not and could not have been reasonably calculated to deceive the purported victim.

Just last term, in *United States v. Lanier*, 117 S. Ct. 1219 (1997), the Court reaffirmed the constitutional requirement that a person have " 'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' " *Id.* at 1224 *(quoting McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)). " 'The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' " *Id.* (*quoting Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)); *United States v. Harriss*, 347 U.S. 612, 617 (1954).

The question presented here is whether a person can be criminally liable for fraud where his conduct does not

comport with any common understanding of that term. This Court has given courts of appeals wide latitude to define the phrase "scheme or artifice to defraud," resulting in a variety of standards.[3] Consequently, the court of appeals here did not feel compelled to reconcile the blatant inconsistency between a charge that Hill misrepresented the value of the 80-acre property to the seller of the property, with a record that: (a) Hill's offer price for the property was based on public-record information about similar property sales; (b) the basis for his offer price was known to the seller; (c) other information about the value of the property was known to the seller and available from public records; (d) Hill believed that the seller was advertising the property for sale on the open market; and (e) the seller was under no obligation to accept Hill's offer if it wanted more money. Instead, the court simply affirmed Hill's convictions based on the pejorative statement that he "caused rigged bids to be prepared and submitted to ADMHMR," without ever

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[3] *See, e.g., United States v. Coffman*, 94 F.3d 330, 334-35 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1425 *and* 117 S. Ct. 1426 (1997); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981). Courts have defined the phrase "scheme or artifice to defraud" with reference to, *inter alia*: "a reflection of moral uprightness, of fundamental honesty, fair play and right feeling in the general and business life of members of society," *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958); whether the defendant's conduct was reasonably calculated to deceive persons of ordinary prudence and comprehension, *United States v. Cochran*, 109 F.3d 660, 664-65 (10th Cir. 1997); and whether the scheme could defraud "only the most gullible" of victims, *United States v. Brien*, 617 F.2d 299, 311 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980).

considering whether Hill's actions could have been reasonably intended to deceive anyone about anything. In the context of an open-market real estate purchase, Hill could not have had "fair warning" that his actions in making and soliciting offers for the property – all of which were known to the seller – would subject him to criminal liability for fraud.

As this Court discussed in *Lanier*, the fair warning doctrine contains three related elements:

> First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second, as a sort of junior version of the vagueness doctrine, the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

117 S. Ct. at 1225 (internal quotations and citations omitted).

These concerns are directly implicated by Hill's convictions here. Nothing in the language of the mail fraud

statute, or in any common understanding of the word "fraud," would have suggested to Hill that he could be found criminally liable for purchasing real estate on the open market – even if he *intended* to pay a low price. (That is, after all, the essence of business.) Instead, the lower courts made a novel construction of the mail fraud statute to apply it to conduct that was not clearly covered and never fairly disclosed to be within its scope. Accordingly, the Writ should be allowed to enable the Court to make clear that the mail fraud statute is not unlimited in scope, and that the actions for which a defendant is convicted must be clearly within that scope. Here, the lower courts' standardless review of Hill's conviction violated his due process rights, and should be reviewed by this Court on a writ of certiorari.[4]

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[4] In addition to the "fair warning" concerns, this Court has also recognized that the Due Process Clause and vagueness doctrine prevent criminal laws from being defined by police, prosecutors and juries, thereby subjecting individuals to the risk of arbitrary enforcement according to the "personal predilections" of those charged with enforcing the laws. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *cf. United States v. Goodman*, 984 F.2d 235, 240 (8th Cir. 1993) ("without some objective evidence demonstrating a scheme to defraud, all promotional schemes to make money . . . would be subject to prosecution on the mere whim of the prosecutor"). That concern is also relevant here, where Hill found himself in the middle of a political investigation into a former state governor's administration, conducted by an Attorney General who was engaged in a campaign for the United States Senate. Those circumstances should have *heightened* the lower court's review of the convictions; instead, the court made *no* meaningful review.

CONCLUSION

This case presents an important opportunity for the Court to decide whether a person can be criminally liable for fraud, consistent with the Due Process Clause and "fair warning" doctrine, where his actions were not and could not have been reasonably calculated to deceive the purported victim. There was no legal precedent or logical basis for charging Hill with fraud in connection with his offer to buy real estate, particularly where he believed that his offer price was subject to free-market considerations. Nevertheless, in the absence of an objective standard of review, the lower courts failed to consider whether Hill's actions were or could have been reasonably calculated to deceive the intended victim, or anyone else.

For the foregoing reasons, Hill respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated: November 6, 1997

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 96-6646
Non-Argument Calendar

D. C. Docket No. CR95-00181-001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEROY HILL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

Before COX and DUBINA, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

JUDGMENT

(Filed Jun. 4, 1997)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of convictions and sentences imposed by the said

District Court in this cause be and the same are hereby AFFIRMED.

Entered: June 4, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/27/97

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6646
Non-Argument Calendar

D. C. Docket No. CR95-00181-001 CRB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEROY HILL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(Filed June 4, 1997)

Before COX and DUBINA, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

Appellant Leroy Hill ("Hill") was charged by indictment in the Southern District of Alabama with four counts of mail fraud, in violation of 18 U.S.C. § 1371 [sic]. After a jury trial, Hill was convicted on three of the counts arising from his scheme to obtain valuable land from the State of Alabama. The district court sentenced Hill to fifteen months imprisonment. Hill challenges his

convictions and sentences. The case presents three issues: (1) whether the evidence is sufficient to support Hill's mail fraud convictions; (2) whether the district court erred when it added six points to Hill's offense level for the loss to Alabama Department of Mental Health and Mental Retardation ("ADMHMR"); and (3) whether the district court erred in sentencing Hill when it added two points under U.S.S.G. § 2F1.1(b)(2)(A) for more than minimal planning.

Whether there was sufficient evidence to support a conviction is a question of law subject to *de novo* review by this court. *United States v. Keller,* 916 F.2d 628, 632 (11th Cir. 1990). All reasonable inferences and credibility choices must be made in favor of the jury's verdict, and that verdict must be sustained if there is substantial evidence to support it. *United States v. Young,* 39 F.3d 1561, 1565 (11th Cir. 1994).

The heart of the government's case was that Hill caused the use of the mails in furtherance of the scheme he devised and executed to obtain 80 acres of state-owned property by means of fraud. The government proved that Hill engaged in bid-rigging activity to lend credence to his bid for the property and to ensure that ADMHMR received three bids, which Hill believed was a prerequisite to a sale.

Hill argues that he is entitled to a new trial in light of *United States v. Brown,* 79 F.3d 1550 (11th Cir. 1996). *Brown,* however, is distinguishable from the present case. Here the fraudulent scheme perpetrated by Hill went far beyond mere misrepresentations about the market value

of the 80 acres of state land. Indeed, the evidence demonstrated that as part of his scheme, Hill caused rigged bids to be prepared and submitted to ADMHMR. Accordingly, we affirm Hill's mail fraud convictions.

The calculation of the amount of loss under U.S.S.G. § 2F1.1 is a factual determination reviewed for clear error. *United States v. Menichino*, 989 F.2d 438, 440 (11th Cir. 1993). A district court's interpretation of the guidelines is reviewed *de novo*. *Id.* This court's recent decision in *United States v. Toussaint*, 84 F.3d 1406, 1407-08 (11th Cir. 1996), suggests that the district court here properly added a six-point increase despite ADMHMR's failure to handle the transaction prudently. Although *Toussaint* concerned a fraudulent loan application, which is the subject of a specific application note, *see* § 2F1.1, comment (n.7(b)), the reasoning applies here as well. Under *Toussaint*, it is not causation of a loss, but the intent to cause such a loss, which justifies the application of § 2F1.1. *Id.* at 1408. Accordingly, we conclude that the district court's finding that Hill's conduct caused a loss equal to his gain from the timber is not clearly erroneous.

The final issue in the case is Hill's argument that the district court erred when it added two points under § 2F1.1(b)(2)(A). Section 2F1.1 provides for a two-level increase in the base offense level if the offense involved "more than minimal planning." U.S.S.G. § 2F1.1(b)(2)(A). More than minimal planning exists if the defendant: (1) undertook more planning than is typical for the commission of the offense in its simplest form; (2) took significant, affirmative steps to conceal the offense; or (3) repeated acts over a period of time, unless it is clear that each instance was purely opportune. *United States v.*

Tapia, 59 F.3d 1137, 1144 (11th Cir.), *cert. denied*, 116 S.Ct. 546 (1995). We will not disturb the court's factual findings as to this issue absent clear error. *United States v. Garcia*, 13 F.3d 1464, 1470 (11th Cir. 1994).

After reviewing the record, we see no clear error by the district court in its finding that Hill engaged in more than minimal planning. Although Hill's scheme was not extremely sophisticated, it did require a substantial amount of planning and effort. Hill (1) inquired as to the presence of timber on the state property in question; (2) obtained aerial photographs; (3) inquired, either directly or indirectly, about purchasing the property on three occasions; (4) recommended a realtor to value the property; (5) requested that employees submit bids; and, (6) prepared those bids for signature. For the foregoing reasons, we affirm Hill's sentences.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
v.	)	
	)	
LEROY HILL,	)	95-00181-CB
	)	
Defendant.	)	
	)	

ORDER

(Filed May 20, 1996)

This matter is before the Court on the defendant's motion for new trial (tab 55). After careful consideration of the arguments presented by the parties in their briefs, the Court finds that the motion is due to be **DENIED** for the reasons set forth below.

I. Background

In September of 1995, defendant Leroy Hill ("Hill") was indicted on four counts of allegedly violating the federal mail fraud statute, 18 U.S.C. § 1341.[1] The gravamen of the indictment was that the defendant had

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[1] This statute provides, in relevant part, that: "Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting to do so, places [or causes to be placed] in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service. . . . " 18 U.S.C. § 1341. The elements of this offense are: (1) a knowing and willful scheme or artifice to defraud another of property of money; and (2) use of the mails to execute the

devised and executed a fraudulent scheme intended to defraud the state of Alabama and its citizens out of an 80 acre tract of land formerly owned by the Alabama State Department of Mental Health and Mental Retardation ("DMHMR"), and that he had utilized the United States mails for the purpose of executing this scheme. The indictment alleged that, as part of this scheme, Hill had engaged in bid-rigging activity to lend credence to his bid for the property, and that he had prompted certain misrepresentations and half-truths about the value of the land in question to be furnished to DMHMR by realtor Bud Jones. In February of 1996, a jury found the defendant guilty of three of the four charged violations of the mail fraud statute.[2] Hill has now moved this Court for a new trial.

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purpose of the scheme. *See United States v. Moore*, 37 F.3d 169 (5th Cir. 1994); *United States v. Hinkle*, 37 F.3d 576 (10th Cir. 1994); *United States v. Biesiadecki*, 933 F.2d 539 (7th Cir. 1991).

[2] The defendant was found guilty of each of the mail fraud counts relating to the three bids which he prepared and mailed or caused to be prepared and mailed to DMHMR. He was acquitted of the mail fraud count which concerned the letter sent by realtor Bud Jones to DMHMR regarding the property's value. As the government observes, however, the acquittal regarding the Jones letter does not necessarily mean that the appraiser's misrepresentations were not part of Hill's scheme. Indeed, the jury could have concluded that while Hill knew of Jones' letter and took advantage of it in carrying out his scheme, he did not cause the letter to be sent.

II. Discussion

A. Standard of Review

The defendant's motion for new trial is governed by Rule 33 of the Federal Rules of Criminal Procedure, which authorizes a court to grant a new trial to a defendant "if required in the interest of justice." Rule 33, Fed.R.Crim.Pro. The Eleventh Circuit has held on numerous occasions that a district court's ruling on a motion for new trial lies within its sound discretion, and will not be overturned on appeal absent a finding of abuse of that discretion. *See United States v. Wilson*, 894 F.2d 1245, 1252 (11th Cir. 1990); *United States v. Sjeklocha*, 843 F.2d 485, 487 (11th Cir. 1988).

B. The Brown Decision

Although the defendant raises a multitude of issues in support of his motion for new trial, his primary argument is that a new trial is mandated by the Eleventh Circuit's recent decision in *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996). In *Brown*, the appellate court reversed the mail fraud convictions of four former housing development executives. At trial, these executives were found to have violated § 1341 through a scheme involving fraudulent representations made by their subordinates to prospective customers regarding the value and investment sales potential of certain homes developed and marketed by the developer.[3] The *Brown* court

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[3] Apparently, there was little, if any, evidence at trial that any of the *Brown* defendants had been direct participants in the alleged fraudulent scheme executed by their employees.

noted that a defendant may not be convicted of mail fraud unless the government proves that he "intended to create a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id.* at 1557 (citing *Pelletier v. Zweifel*, 921 F.2d 1465, 1498-99 (11th Cir. 1991)). Further, the court held that a scheme to defraud is not proved "where a reasonable juror would have to conclude that the representation is about something which the customer should, and could, easily confirm – if they wished to do so – from readily available external sources." *Id.* at 1559 (citing *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 570 (7th Cir. 1991); *Blount Fin. Servs. v. Walter E. Heller and Co.*, 819 F.2d 151 (6th Cir. 1987)).

In the *Brown* case, the fraudulent scheme charged by the government was comprised solely of misrepresentations about the market value and investment sales potential of the marketed homes and the reasonableness of the prices charged by the defendants for such homes. The Eleventh Circuit concluded that the victims in *Brown* could easily have confirmed the reasonableness of the prices being charged, as accurate pricing information for the relevant housing market was readily available to them through external sources. In light of this determination, and to prevent the criminal fraud statutes from being used to convict the defendants solely because they

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Although the *Brown* court recognized that there is no vicarious liablilty authorized by the mail fraud statute, *see United States v. Toney*, 605 F.2d 200, 208 (5th Cir. 1979), it assumed for the sake of discussion that the government had been able to prove direct participation in the scheme by the defendants. *Brown*, 79 F.3d at 1555-56 n.9.

charged their customers excessive prices, the *Brown* court reversed their convictions.[4] *Id.* at 1562.

C. Applicability of Brown

The defendant contends that *Brown's* exposition of this circuit's mail fraud law entitles him to a new trial. In particular, Hill asserts that the "scheme" alleged by the government in this case could not have been reasonably calculated to deceive a person of ordinary prudence because the victims of the scheme had information readily available to them about the true value of the land tract at issue in this case. The Court rejects this argument for two distinct reasons.

1. Fraud not limited to value

First, as the government has pointed out in its brief, the fraudulent scheme perpetrated by Hill went well beyond mere misrepresentations about the value of the land. Indeed, the evidence at trial showed that, as part of his scheme to defraud, Hill caused rigged bids to be

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[4] In dicta, the *Brown* court expressed great concern that prosecutors could use the federal fraud statutes "as a largely unlimited device to attack wrongdoing whenever prosecutors feel wrongdoing exists." *Id.* at 1562 n.20. Given the facts of that case, the *Brown* court worried that the defendants may have been convicted solely for charging high prices. *Id.* at 1562. Thus, the Eleventh Circuit's ruling was motivated in part by a desire to rein in prosecutorial discretion with respect to mail fraud prosecutions. As explained *infra*, no analogous concerns are present in the case at bar.

prepared and submitted to DMHMR by two of his employees. While this deception may have contributed tangentially to Hill's efforts to deceive DMHMR about the true value of the property, its impact was not confined to the valuation question. Rather, Hill's bid-rigging activity created the illusion that two other independent bids for the property had been submitted, and that Hill's was the highest of those independent bids.[5] Thus, there was a component of Hill's fraudulent scheme which concerned the legitimacy of the bidding process rather than the value of the property per se. In this case, unlike in *Brown*, the fraudulent scheme was not limited to mere misrepresentations regarding the true market value of the

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[5] Anticipating the government's argument, defense counsel urges this Court to ignore those aspects of Hill's fraudulent scheme which were not directly tied to the value of the land. In support of his position, the defendant again relies on *Brown*, in which the government attempted to persuade the appellate court that the fraudulent activity was not the high prices charged, but the defendants' deception about those high prices. The *Brown* court found that argument unpersuasive, in that the fraud was limited to deception about value. *See Brown*, 79 F.3d at 1562. By contrast, the fraudulent conduct in this case operated on multiple levels, and was designed, at a minimum, to deceive DMHMR about the value of the land and the legitimacy of the bidding process. Stated differently, the government presented evidence that Hill intended to deceive DMHMR not only about the true value of the land but also about the validity of the bidding procedure. Through the combined effect of these deceptions, he sought to defraud the state out of its property. Meanwhile, the *Brown* defendants did not deceive their victims regarding anything other than the value of the homes. Therefore, this case is distinguishable from *Brown*, and the Court cannot agree with Hill that the government is merely offering a distinction without a difference.

parcel of land. Therefore, the outcome of the trial in this case is in no way inconsistent with the Eleventh Circuit's holding in *Brown*, and Hill's reliance on *Brown* in his motion for new trial is misplaced.

2. Defendant lacked knowledge that valuation information was available

A second, independent reason why *Brown* is inapposite concerns that court's holding that a mail fraud violation does not occur where a misrepresentation about value would be easily verifiable by the victim from a readily available, external source. On its face, this language would appear to bolster the defendant's request for new trial. In the trial of this cause, defense counsel attempted to present evidence that officials at the Alabama Department of Conservation ("DOC") had knowledge of the value of the timber on the tract of land at issue, which information could have been made available to DMHMR officials had they simply contacted the DOC before completing the sale to the defendant. The Court excluded this testimony. Hill now contends that this excluded evidence would have shown that DMHMR could easily have refuted the valuation misrepresentations made as part of his scheme, and that he therefore could not have engaged in a scheme which was reasonably calculated to defraud the state or its citizens. This argument cannot withstand serious scrutiny.

It is well-established that a scheme to defraud need not be successful in order to be unlawful, and that no injury or damage to the victim need be proved by the government. *See Brown*, 79 F.3d at 1557-58 n.12; *Pelletier v.*

Zweifel, 921 F.2d 1465, 1498 (11th Cir. 1991). Simply put, it is immaterial whether the perpetrator of the fraudulent scheme actually deceived anybody or not. Hence, the language in *Brown* about the availability of value information from an external source does not and cannot impose a requirement that a fraudulent scheme must be successful in order to be unlawful. Rather, the *Brown* valuation requirement makes sense in the context of federal mail fraud law only insofar as a scheme cannot be reasonably calculated to deceive someone about the value of a tract of land if the defrauding party knows that the prospective victim will have ready access to information about the true value of that land. Therefore, courts have held that where a deception involves misrepresentations as to publicly available valuation information, there can be no mail fraud violation, as the scheme could not have been reasonably calculated to deceive a person of ordinary prudence, as a matter of law. *See Brown*, 79 F.3d at 1559 (market prices of homes easily obtained by calling developers' competitors or looking at newspaper ads); *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 570 (7th Cir. 1991) (whether rate of return on annuity is "highest" may be easily checked by reading *Wall Street Journal*); *Blount Financial Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 152-53 (6th Cir. 1987) (true "prime rate" readily available to institutional consumer loan company); *Compania Sud-Americana de Vapores, S.A. v. IBJ Schroder Bank & Trust Co.*, 785 F. Supp. 411, 425 (S.D.N.Y. 1992) (interbank interest rate can be readily calculated from public information).

In all of the above-cited cases, the defendants were exonerated of mail fraud charges because the information

which was the subject of their fraudulent schemes was public information which would have been readily available to the respective victims. As the defendants in such cases would or should have known that such information was readily available to their victims, their schemes could not have been reasonably calculated to deceive persons of ordinary prudence about the substance of that information. Hill's case is different. In the trial of this cause, the information about the value of the state-owned tract of land certainly was not publicly available. Moreover, defense counsel conceded at trial that Hill did not know, and had no basis for knowing, that any agent of the state of Alabama possessed any inkling of the true value of that tract of land. Given this fact, whether such data was actually accessible to DMHMR or not is irrelevant, because it is undisputed that Hill possessed no knowledge whatsoever that DMHMR had ready access to information about the value of the property.[6] As far as Hill knew, nobody in the state had any idea how much the property was worth. Because Hill did not know of any expedient means that DMHMR could have employed to verify his valuation misrepresentations, the legal conclusion that his scheme was reasonably calculated to deceive its victim is not undermined by the existence of such a means.[7]

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[6] The Court adopted this approach in numerous evidentiary rulings in the trial of this cause. Specifically, the Court excluded evidence regarding DOC's knowledge of the value of the land on the ground that such knowledge would be irrelevant to Hill's intent to defraud unless he was aware that state agents possessed this knowledge.

[7] This rationale is perhaps clarified through an analogy. Suppose a defendant is charged with participating in a postal

To be clear, the Court's interpretation of *Brown* and the other "readily available information" cases cited above does not alter the burden of proof borne by the government in a criminal case. The government retained the burden of proving beyond a reasonable doubt each of the elements of the offenses charged. *See Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993). In this case, the government presented evidence of Hill's intent to defraud through its case-in-chief. However, as a defense to the charges against him, Hill sought to attack the government's evidence of intent by presenting evidence regarding the knowledge of various state agents concerning the value of the property. The Court excluded this evidence on relevance grounds. *See United States v. Ethridge*, 948 F.2d 1215, 1217 (11th Cir. 1991) (adhering to liberal policy of admitting defendant's "crucial relevant" evidence regarding intent to defraud). For the reasons stated previously, the Court held that this testimony would be relevant to Hill's intent to defraud

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marketing scam to defraud a retiree out of her life savings. As part of his scheme, he persuaded her to invest in a fictitious business, and absconded with the money. Further suppose that, unbeknownst to the defendant, said retiree had always retained a financial advisor to assist her with her investments. Had she discussed this matter with her advisor, as was her typical practice, she would have learned that the proposed investment was bogus. However, she did not do so, and was deceived. Nonetheless, the defendant in this example remains guilty of mail fraud. His scheme was reasonably calculated to deceive the retiree, and the fact that she usually consulted with a financial advisor unbeknownst to the defendant does not undercut the defendant's intent to defraud her, where he had no idea that she would have ready access to information regarding the legitimacy of the investment "opportunity" which he pitched to her.

only if he had been aware that state officials had knowledge about the value of the property at the time that he formulated and executed his scheme. As an evidentiary matter, notwithstanding the overall burden of proof, the government was not required to prove that Hill lacked knowledge of the state agents' information in order for such evidence to be excluded. Rather, as this evidence was part of Hill's affirmative defense, he was required to show the relevance of the evidence he offered in order for said evidence to be admissible. *See, e.g., United States v. Davis*, 902 F.2d 860 (11th Cir. 1990) (defendant has initial burden of production as to affirmative defense); *United States v. Rodriguez*, 917 F.2d 1286 (11th Cir. 1990). Because he conceded that he lacked awareness of the state officials' knowledge, the evidence was not relevant to his intent to defraud the state and its citizens.

Accordingly, whether any department or agency of the state of Alabama other that DMHMR actually did know the value of the land has no bearing on whether Hill's scheme was reasonably calculated to deceive the state of Alabama or its people. The "readily available information" language in *Brown* relates solely to whether a fraudulent plan is reasonably calculated to deceive or not. To hold otherwise would be effectively to require that a fraudulent scheme actually deceive a victim of ordinary prudence in order to be unlawful. Neither § 1341 nor *Brown* contemplates or compels such a conclusion. Notwithstanding the existence of any avenue by which DMHMR could have investigated the veracity of Hill's value representations, there was ample evidence to support the conclusion that Hill's scheme was reasonably calculated to deceive a person of ordinary prudence.

Having engaged in criminal activity by devising a scheme which was reasonably calculated to defraud, Hill is not entitled to the windfall of a new trial or an acquittal simply because his victims, through avenues unbeknownst to him, could have disproven his representations as to value. Therefore, the evidence concerning the state officials' knowledge was properly excluded in this case, and no new trial is warranted on that basis.

For the foregoing reasons, the Court determines that the Eleventh Circuit's decision in *United States v. Brown* in no way compels a finding that a new trial in this cause is necessary "in the interest of justice". Therefore, to the extent that Hill's motion for new trial is premised on the *Brown* decision, the motion is meritless.

D. Other Bases for New Trial Motion

In his motion, the defendant offers a litany of other reasons why he believes a new trial is warranted pursuant to Rule 33. These arguments identify alleged errors in the jury charge, allegedly erroneous evidentiary rulings, selective prosecution, lack of reliance in fact by the victims, and various other grounds for new trial. Most of these objections were raised and resolved on the record at or before trial, and the Court will not revisit them now. As for the remaining grounds for the motion, the Court finds that none of them are of sufficient merit to render a new trial necessary in this case in the interest of justice.

III. Conclusion

For all of the foregoing reasons, the Court finds that the defendant's motion for new trial is due to be, and the same hereby is, **DENIED**.

It is so **ORDERED**.

DONE this the 20th day of May, 1996.

/s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

United States District Court

Southern District of Alabama

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
v.	(For Offenses Committed On or After November 1, 1987)
Leroy Hill	Case Number: 1:95CR00181-001
	Danner Frazier and Arthur Madden
	Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____

_ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 2, 3, and 4 of the indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1341	Mail Fraud	07/27/1993	2
18 U.S.C. § 1341	Mail Fraud	07/29/1993	3
18 U.S.C. § 1341	Mail Fraud	07/30/1993	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 1 of the indictment

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 262-40-6380

Defendant's Date of Birth: 04/03/1933

Defendant's USM No.: 06106-003

Defendant's Residence Address:

7901 Grand Bay Wilmer Road

Grand Bay AL 36541

Defendant's Mailing Address:

7901 Grand Bay Wilmer Road

Grand Bay AL 36541

05/22/1996
Date of Imposition of Judgment

/s/ Charles R. Butler, Jr.
Signature of Judicial Officer

CHARLES R. BUTLER, JR.

CHIEF U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

5/30/96
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 15 month(s) .

As to counts 2, 3, and 4 of the indictment to run concurrently.

___ The court makes the following recommendations to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district:

___ at ____ a.m./p.m. on _____ .
___ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

___ before 2 p.m. on _____ .

X as notified by the United States Marshal.
___ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____
_____
_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 year(s) . as to counts 2, 3 and 4 of the indictment to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

_ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is to make restitution in the accordance with the provisions of 18 U.S.C. Section 3663.

2. The U.S. Probation Office is to pursue collection of the amount of restitution remaining due, and shall request the Court to establish a payment schedule if necessary.

3. The defendant is prohibited from incurring new credit charges, or opening additional lines of credit, without approval of the Probation Officer, unless the defendant is in compliance with the payment schedule.

4. The defendant shall provide the U.S. Probation Officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5. Part B.

	Assessment	Fine	Restitution
Totals:	$ 150.00	$ 51,377.15	$ 111,171.25

_ If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $31,377.15 .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

_ The interest requirement is modified as follows:

RESTITUTION

_ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until ____ . An Amended Judgment in a Criminal Case will be entered after such determination.

X The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
State of Alabama/ Department of Mental Health	$111,171.25	$111,171.25	
Totals:	$111,171.25	$111,171.25	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A _ in full immediately; or

B X $131,321.25 immediately, balance due (in accordance with C, D, or E); or

C _ not later than _____; or

D X in installments to commence 30 day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E _ in ____ *(e.g. equal, weekly, monthly, quarterly)* installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

_ The defendant shall pay the cost of prosecution.

X The defendant shall pay the following court cost(s):

Cost of incarceration: $26,689.95

Cost of SRT: $4,687.20

_ The defendant shall forfeit the defendant's interest in the following property to the United States.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the

Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

_ The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See Additional Factual Findings and Guideline Application Exceptions – Sheet 0.00

Guideline Range Determined by the Court:

Total Offense Level: 14

Criminal History Category: 1

Imprisonment Range: 15 to 21 months

Supervised Release Range: 2 to 3 years

Fine Range: $4,000.00 to $40,000.00

_ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $111,171.25

_ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide

restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

_ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

_ Partial restitution is ordered for the following reason(s):

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines. The sentence imposed addresses the seriousness of the offense and sentencing objectives of deterrence, incapacitation and punishment.

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

_ The sentence departs from the guideline range:

_ upon motion of the government, as a result of defendant's substantial assistance.

_ for the following specific reason(s):

ADDITIONAL FACTUAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

1. Although the defendant objects to paragraph #10 of the Presentence Report in that several significant facts were omitted, the Court denied this objection unless such factors affect the computation of the guidelines.

2. In regard to paragraph #11 of the Presentence Report, the fact that the defendant was acquitted of Count 1, is to be added to the Report.

3. The information contained in paragraph #12 of the Presentence Report, even though there may be an inaccuracy, does not affect the calculation of the guidelines. Trial testimony was that Buckley "jokingly" offered to bid and the defendant subsequently asked him to.

4. The amount of loss is accurately reflected in the Presentence Report in paragraph #23.

5. The defendant has not accepted responsibility in any meaningful way and therefore, is not eligible for a reduction pursuant to Guideline Section 3E1.1.

6. Based upon preponderance of the evidence, the defendant did contact the State of Alabama. There was also the element of concealment in the offense. The evidence supports that there is more than minimal planning in this case.

7. A departure in this case is not going to be made and therefore, denies the defendant"s [sic] request.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6646

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEROY HILL,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

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(Filed Aug. 25, 1997)

ORDER:

Appellant's motion to stay mandate pending petition to Supreme Court for writ of certiorari is denied.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6646

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEROY HILL,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

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(Filed Aug. 8, 1997)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: COX and DUBINA, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

GSG

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	*	**CR. NO. 95-00181-AH**
	*	
	*	**USAO NO. 95R0215**
v.	*	
LEROY HILL	*	**Violation: 18 USC 1341**
	*	
	*	(Filed Sep. 21, 1995)

The Grand Jury charges:

INDICTMENT

PREAMBLE

On or about August 25, 1993, the Alabama State Department of Mental Health and Mental Retardation ("MHMR") deeded 80 acres of real property, timber and mineral rights included, in south Mobile County, Alabama to LEROY HILL for $48,400.00. Although MHMR owned the property in question prior to the sale, the Alabama State Department of Conservation and National Resources ("Department of Conservation") managed the property for the State of Alabama. Based on a timber cruise performed in January, 1990, the Department of Conservation determined that the timber on the 80 acres was valued at approximately $183,000.

COUNT ONE

1. From on or about May, 1992, continuing through and until on or about March, 1994,

LEROY HILL

wilfully and knowingly devised and intended to devise a scheme and artifice to defraud and for obtaining property from the State of Alabama and its citizens, by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises were false when made, that is, the said LEROY HILL devised a plan to purchase real property, including its timber and mineral rights, from the State of Alabama for a price at less than one-third of its actual value by making it appear to certain State officials that the land was only worth the price he eventually paid for it.

It was a part of the scheme and artifice to defraud and obtain property by means of false and fraudulent pretenses, representations and promises that in May, 1992, LEROY HILL, knowing there was timber worth harvesting on the property, caused inquiries to be made about purchasing the property and found out that the property was not for sale.

It was further a part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses, representations and promises that in 1993, LEROY HILL personally contacted the newly-appointed Commissioner of MHMR about purchasing the property. HILL provided MHMR with the name of a

realtor who was purportedly familiar with the value of property in the same area as the property in question.

It was further a part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses, representations and promises that, after LEROY HILL and [sic] was told that MHMR would need to obtain bids on the property, HILL caused rigged bids to be submitted to MHMR. LEROY HILL had two employees of his company, Hill & Brooks Coffee Company, Inc., sign two bids which he had previously prepared and caused to be prepared. He then caused those bids to be submitted to MHMR, together with a bid in his own name for an amount slightly higher than the employees' bids.

2. On or about the 16th day of July, 1993, in the Southern District of Alabama, Southern Division,

LEROY HILL,

for the purpose of executing the aforesaid scheme and artifice to defraud, caused to be placed in an authorized depository for mail matter an envelope addressed to Mr. George Carleton, Alabama Mental Health, P.O. Box 3710, Montgomery, AL 36109, containing a letter from a realtor;

All in violation of Title 18, United States Code, Section 1341.

COUNT TWO

1. The Grand Jury re-alleges all allegations contained in paragraph One of Count One, and further alleges as follows:

2. On or about the 27th day of July, 1993, in the Southern District of Alabama, Southern Division,

LEROY HILL,

for the purpose of executing the aforesaid scheme and artifice to defraud, cause [sic] to be placed in an authorized depository for mail matter an envelope addressed to Mr. Richard Hanan, Dept. of Mental Health & Mental Retardation, P.O. Box 3710, Montgomery, AL 36109, containing a letter signed by Dan Buckley;

All in violation of Title 18, United States Code, Section 1341.

COUNT THREE

1. The Grand Jury re-alleges all allegations contained in paragraph One of Count One, and further alleges as follows:

2. On or about the 29th day of July, 1993, in the Southern District of Alabama, Southern Division,

LEROY HILL,

for the purpose of executing the aforesaid scheme and artifice to defraud, cause [sic] to be placed in an authorized depository for mail matter an envelope addressed to Mr. Richard Hanan, Department of Mental Health and Mental Retardation, P.O. Box 3710, Montgomery, AL 36109, containing a letter from **LEROY HILL;**

All in violation of Title 18, United States Code, Section 1341.

COUNT FOUR

1. The Grand Jury re-alleges all allegations contained in paragraph One of Count One, and further alleges as follows:

2. On or about the 30th day of July, 1993, in the Southern District of Alabama, Southern Division,

LEROY HILL,

for the purpose of executing the aforesaid scheme and artifice to defraud, cause [sic] to be placed in an authorized depository for mail matter an envelope addressed to Mr. Richard Hanan, Dept. of Mental Health & Mental Retardation, P.O. Box 3710. Montgomery, AL 36109, containing a letter from Jerry Smith;

All in violation of Title 18, United States Code, Section 1341.

A TRUE BILL

/s/ Illegible
FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

/s/ J. Don Foster by Ginny S. Granade
J. DON FOSTER
UNITED STATES ATTORNEY

September, 1995

PENALTY PAGE

U.S. v. Leroy Hill

USAO NO. 95R0215

AUSA: GSG

VIOLATIONS: Count One – Four 18 USC §1341 Mail Fraud

PENALTIES: Each Count: 5 yrs/$250,000/3 yrs SRT/$50 SA